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No. 84-1069

In The
Supreme Court of the United States
October Term, 1984

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY OF THE FLORIDA PUBLIC SERVICE COMMISSION TO THE BRIEFS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

May the Federal Communications Commission preempt the states' prescription of depreciation rates for intrastate ratemaking purposes in order to enhance the financial strength of telephone companies?

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PRELIMINARY STATEMENT

This reply brief is filed in response to the Motions to Dismiss and Briefs in Opposition filed by the Federal Communications Commission and United States of America (Federal Respondents), AT&T and the Bell Operating Companies (AT&T and Bell Companies), and GTE Service Corporation (GTE). The argument of the People of the State of California regarding the interpretation of 47 U.S.C. §220 is adopted herein.

ARGUMENT

The Preemption Standard Under 42 U.S.C. §152

The Respondents contend that the FCC's preemption of depreciation rates falls squarely within the cases on FCC preemption authority. This is simply not true. The essential element in those cases is:

> State regulation must encroach on FCC jurisdiction over interstate communications.

Not one of the Respondents claim that the states' use of different depreciation methods for intrastate ratemaking encroaches on any FCC authority. There is no cited FCC authority that is invaded by the states. The states are not regulating interstate communications and state regulation does not preclude FCC regulation of interstate communications.

When it enacted the Communications Act of 1934, Congress was aware that the same facilities carry interstate and intrastate telephone communications.[1] Nevertheless, it explicitly reserved state jurisdiction over intrastate communications via 47 USC §152(b).[2] In all of the FCC preemption cases dealing with telephone regulation the Courts realized that Congress meant to preserve state jurisdiction over intrastate telephone communications. The Courts also realized that the FCC could not regulate the interstate telephone network if state jurisdiction was rendered totally inviolate by §152(b). The Courts then determined that in cases of a direct conflict of jurisdiction, FCC authority would prevail. In each case preemption was upheld because state regulation enroached on FCC authority to regulate interstate communications. This occurred: (1) where the state directly regulated interstate communications, a power reserved to the FCC,[3] or (2) where it was impossible to comply with inconsistent state and FCC regulations.[4]

[1]See *North Carolina Utilities Commission v. FCC (NCUC II)*, 552 F.2d 1036, 1046 (4th Cir. 1977), *cert. den.*, 434 U.S. 874 (1977).

[2]By its terms this reservation is subject to §301, which provides for FCC regulation of broadcast carriers. Respondents' references to cases on FCC broadcast authority are largely inapposite.

The cases are clear, the FCC may preempt only that state regulation that encroaches on FCC *authority* over interstate communications. None of the cited cases allowed preemption simply because state regulation of intrastate communication rates, service or facilities affected the interstate network. An indirect economic effect is not enough. This was again emphasized by the District of Columbia Circuit in *NARUC v. FCC*, 746 F.2d 1492, 1500 (D.C. Cir. 1984):[5]

> . . . Section 152(b) merely confirms that the states retain jurisdiction over purely intrastate calls notwithstanding the *economic* effect such state jurisdiction might have on the interstate market. . . . (emphasis supplied)[6]

[3]See *New York Telephone Company v. FCC*, 631 F.2d 1059 (2nd Cir. 1980). In that case, the Court concluded that the state was regulating charges for interstate communications and that the FCC could preempt the state and require the company to file a tariff with the FCC.

[4]See *Puerto Rico Telephone Company v. FCC*, 553 F.2d 694, 700 (1st Cir. 1977), wherein the court, responding to arguments that FCC regulation of equipment used in interstate communications would oust state regulation, stated that any other result would have §152(b) oust FCC jurisdiction over all facilities that are used for intrastate telephone service.

[5]Again, as in the other preemption cases, the Court stated that the state regulations "infringe on the FCC's jurisdiction over interstate calls." (at 1501)

[6]On the other hand, under GTE's preemption standard, the FCC may preempt any state regulation that has an economic effect on the interstate market.

(footnote continued)

When the states set intrastate rates using their own depreciation rates, they are setting *only* intrastate communications rates. There is no intrusion on FCC authority over interstate communications. The only effect intrastate rates may have on interstate communications is an indirect economic effect. This effect is not sufficient to permit preemption.[7]

GTE claims that Congress acquiesced to its version of the preemption test, citing to a 1984 Congressional report. However, the report does not support GTE's claim. Congress did acquiesce to the current caselaw, but it stated what that caselaw said:

> . . . Section 2(b) does not detract from the FCC's jurisdiction over common carrier communications services that are interstate in character.
>
> * * *
>
> . . . Under Section 2(b) the FCC is barred from regulating those local common carrier services which the states may regulate without *infringing* upon Federal regulatory *authority* over rates and terms under which interstate common carrier services are provided.[8] (emphasis supplied)

Curiously, the Federal Respondents assert that the present case is consistent with prior FCC preemption cases, yet also state that state regulation must encroach substantially upon the authority of the FCC in order to be preempted. (Brief, at 14, 15).

[7]GTE admits that "inseparability" is necessary for FCC preemption and quotes the lower Court's finding of inseparability. GTE and the lower Court both ignore the fact that "inseparability" is the test for the impossibility of dual regulation. See *Puerto Rico Telephone Company v. FCC, supra.* The lower court actually refuted its own finding of inseparability: "By contrast, the instant appeal raises no question of actual physical impossibility of complying with dual federal and state regulation". . . . (JA-16)

[8]H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 62 (1984).

Congress did not acquiesce to GTE's version of the standard. It acquiesced to Florida's standard.[9]

Discretion to Preempt Depreciation

All Respondents claim that the FCC has the discretion to preempt depreciation for intrastate ratemaking purposes. However, §220(j) makes it clear that the relationship between state and federal authority under §220 is fixed by law and that only Congress can change that relationship. Section 220(b) either preempts the states as a matter of law or it does not. If it does not, §220(j) does not permit the FCC to preempt depreciation for intrastate ratemaking purposes.[10]

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[9]The Federal Respondents and GTE cite *Computer and Communications Industry Association v. FCC,* 693 F.2d 198 (D.C. Cir. 1982), *cert. den.,* 461 U.S. 938 (1983), as showing § 152(b) to be no bar to FCC preemption affecting intrastate rates, but they ignore the rationale for preemption:

> . . . The FCC would necessarily be prevented from discharging its statutory duty under Sections 1 and 2(a) to regulate interstate communications.
>
> (at 215).

That case turned on the same factors as all the other preemption cases, the inseparability of intrastate and interstate facilities. CPE rate regulation was inseparable because it was a charge for a *facility,* not a charge for communication *service.* Rates for communications service remain fully separable.

GTE cites *New York Telephone Company v. FCC, supra,* as allowing the FCC to preempt intrastate rates that affect interstate communications. Actually, the Court found that the charges were applied directly to interstate communications (at 1065, 1066). Further, the Court found that the state action "encroaches upon FCC authority" (at 1066).

[10]Surprisingly, the Federal Respondents assert that Congress should consider the questions raised by the FCC's decision to preempt. Congress already considered that question. The federal/state relationship under §220 may only be changed by an act of Congress. §220(j). The FCC never reported to Congress on the need for legislation to further harmonize state and federal authority under §220. Instead, the FCC legislated that harmony itself.

Section 220(b) cannot be read as binding the states for intrastate ratemaking purposes when it makes no explicit statement to that effect *and* the Communications Act explicitly divides jurisdiction between the FCC and the states.[11] It is also not reasonable to view §220(b) as preempting as a matter of law when the FCC had, for forty years, allowed the states to deviate at will from its prescribed depreciation rates.[12] Certainly, Congress had long ago acquiesced to this view. An administrative agency may have discretion to change policy, but longstanding interpretations of law may not be abandoned by an agency simply because its policies have changed.

The Federal Respondents and AT&T and the Bell Companies claim that this long history of state deviation is actually due to exemptions granted pursuant to §220(h). This is not so. The states have never requested an exemption as a condition of independent action and there is not a single reported FCC decision that grants an exemption pursuant to §220(h).[13] This lack of waivers under §220(h) shows that the FCC had never read §220(b) as binding the states as a matter of law, for if it did, the FCC would have know-

[11]See Reply of People of the State of California, *et al.*, Case No. 84-889.

[12]A claim of reserved discretionary power to preempt is no defense on this point, as the FCC's long practice shows that, until 1983, it never viewed §220(b) as *requiring* state adherence. In fact, the FCC had the opposite opinion during that entire time. See *In the Matter of Amendment of Part 31,* 89 F.C.C. 2d 1094, 1106-1107 (1982) (JA-82).

[13]Federal Respondents cite to *In re Amendment of Part 31,* 68 F.C.C. 2d 902 (1978), as an example of exemption under §220(h) (Note 4, at 5). That decision doesn't grant *any* exemption from *any* of the provisions of §220 for *any* particular state. Instead, it reflects the FCC's view that its accounting prescriptions don't bind *any* state at all. (at 906, 907).

ingly ignored its duty under §220(h) to grant exemptions as a condition of independent state action.[14]

National Importance

All of the Respondents basically admit that the rule of law announced by the lower court would permit the FCC to preempt virtually any aspect of intrastate ratemaking. Their defense, however, is that it hasn't happened yet. The Federal Respondents assert that the states remain free to set the rate of return, determine the rate base, expenses and rate structure for intrastate purposes, *for now.* The Federal Respondents do not say, *however,* that the FCC cannot preempt those areas in the future. None of the Respondents point to any such limitation of FCC preemption power in this case.

CONCLUSION

A consistent line of cases, expressly approved by Congress, has recognized that FCC preemption must be based upon a direct clash of state and FCC jurisdiction. The lower court has substantially departed from that line of cases by authorizing FCC preemption solely because of the indirect economic effect that state ratemaking policies *may* have on otherwise separable FCC policy. The lower Court's decision provides the FCC with virtually unlimited

[14]The Federal Respondents state that §220(h) allows the FCC to except carriers from its prescriptions and states that this structure would make little sense if there was no Congressional intent to preempt (Note 18, at 14) Actually, §220(h) provides for exemptions from provisions of §220. The Congressional history further shows that both the House and Senate adopted §220(h) with the understanding that it would allow the FCC to exempt carriers from its *intrastate* authority. See *Hearings on H.R. 8301,* 73d Cong., 2d Sess. 140, 144, 190-191.

preemption authority. The FCC has no discretion to preempt depreciation. The relationship of state and federal depreciation authority is fixed by the provisions of 47 USC §220, and §220(j) precludes such discretion.

Respectfully submitted,

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